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FILED
SEP 9 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1704

In The

Supreme Court of the United States

October Term, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE ASBESTOS VICTIMS OF AMERICA IN SUPPORT OF RESPONDENTS

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September 9, 1998

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT 3

A. The question common to all class members was avoidance of the risk of loss of Fibreboard's insurance..... 4

B. The settlement provides substantial benefits to all class members..... 9

C. This settlement does not suffer the infirmities of the *Amchem* settlement..... 10

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

Ahearn v. Fibreboard Corp., 162 F.R.D. 505 (E.D. Tex. 1995) 14

Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997) ..... *passim*

Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co., 45 Cal.App.4th 1, 52 Cal.Rptr. 690 (1996) 6

Devlin v. Johns-Manville Corp., 495 A.2d 495 (N.J.Super.L. 1985) 8

Eagle-Picher Industries, Inc. v. Cox, 481 So.2d 517 (Fla.App. 1985) 8

Fusaro v. Porter-Hayden Co., 548 N.Y.S.2d 856 (N.Y.Sup. 1989) 8

Hagerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986) 8

In re Asbestos Litigation, 90 F.3d 963 (5th Cir. 1996) 4, 5, 10

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) 8

Marinari v. Asbestos Corp., Ltd., 612 A.2d 1021 (Pa.Super. 1992) 8

Mauro v. Raymark Industries, Inc., 561 A.2d 257 (N.J. 1989) 8

Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020 (Md. 1983) 8

Potts v. Celotex Corp., 796 S.W.2d 678 (Tenn. 1990) 8

TABLE OF AUTHORITIES – Continued

Page(s)

Rutherford v. Owens-Illinois, Inc., 16 Cal.4th 953, 67 Cal.Rptr. 16 (1997) 8

Shapiro v. Republic Ins., 52 Cal.2d 437, 341 P.2d 289 (1959) 6

Sheppard v. A.C. and S. Co., 498 A.2d 1126 (Del. 1985) 8

Smith v. Bethlehem Steel Corp., 492 A.2d 1286 (Md. 1985) 8

Urie v. Thompson, 337 U.S. 163 (1949) 7

Velasquez v. Fibreboard Paper Products Corp., 97 Cal.App.3d 881, 159 Cal.Rptr. 113 (1979) 7

Wilson v. Johns-Manville Sales Corp., 684 F.2d 111 (5th Cir. 1982) 8

STATUTES AND RULES

Fed. Rules Civ. Proc. Rule 1 17

Rule 23 ..... 3, 7, 9, 17

Rule 23(a)(4) 3, 4, 11

Rule 23(b)(1)(B) 4, 10

Rule 23(b)(3) 10

TEXT

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991) 7

INTEREST OF AMICUS CURIAE[1]

The Asbestos Victims of America ("AVA") submits this brief in support of the Respondents who in the court below obtained affirmance of the District Court's order approving the settlement among the class of asbestos victims, Fibreboard and its insurers. AVA's interest in this action is to preserve the compensation that, without the settlement, might not have otherwise been available.

AVA was founded in 1981 by asbestos victims and friends to provide a clearinghouse for information on asbestos disease and available medical, social, and legal services. A nonprofit educational organization, AVA has grown to an alliance of more than 20,500 victims, survivors, union members, scientists, medical and legal professionals, and concerned individuals.

AVA is dedicated to increasing awareness of the national asbestos tragedy and its effects upon present and future generations, and to helping victims and their families to obtain financial justice for their injuries and deaths. As part of this effort, AVA is committed, to the extent its resources permit, to taking all available steps to ensure that developing law provides fair and adequate compensation to persons who develop or die from asbestos-related diseases.

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[1] Letters of consent to the filing of this brief have been filed with the Clerk. No counsel for any party authored the brief in whole or in part, and no person or entity other than counsel for *amicus curiae* made any monetary contribution to its preparation or submission.

In this connection, AVA filed an *amicus curiae* brief in this Court to oppose the class-action settlement in *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231 (1997), as unfair to class members in the denial of any compensation to significant claims and in the failure of class counsel to adequately represent the entire Class.

In the instant case, however, AVA supports the class settlement because it ensures fair and adequate compensation for asbestos victims in a manner that balances the victims' ability to control their own claims and the need to secure resources that might not otherwise have been available.

Therefore AVA files this *amicus* brief to urge affirmance of the Court of Appeals' approval of this settlement.

SUMMARY OF ARGUMENT

The Respondents are addressing in detail the legal challenges raised by Petitioners to the settlement now before this Court. AVA wishes to emphasize (1) the all-or-nothing situation in which Fibreboard's insurance was at risk in 1993, (2) the compelling interests that tens of thousands of victims of asbestos diseases have in seeing this settlement approved, and (3) the readily-apparent differences between this settlement and the settlement this Court rejected in *Amchem*.

From the victims' perspective, the settlement's benefits are enormous and its costs are few. Without the settlement, Fibreboard's insurance coverage might have

been lost on appeal and asbestos victims might never have received any compensation for their injuries caused by exposure to Fibreboard products containing asbestos. This Court therefore should not allow the abstract theoretical issues voiced by Petitioners to obscure the real interest of all parties, including asbestos victims, in the settlement's approval.

ARGUMENT

AVA supports this settlement because, when it was promulgated, it represented the only certain method for meeting the needs of asbestos victims in light of the possible alternative—the loss of Fibreboard's insurance coverage.

AVA therefore urges that the debate over the application of Rule 23 to this settlement take into account the overriding interests of the victims of asbestos diseases. These asbestos victims are hurting—physically, financially, and emotionally. They lack compensation for their medical expenses and lost wages. In many instances their life-expectancy has been significantly shortened by their disease. Their interests lie in a quick and sure path to fair compensation for all victims, present and future.

Moreover, when the settlement is viewed as a response to the unique and serious need for an alternative to an all-or-nothing judicial ruling on insurance coverage, it will be seen that the central requirements for a class action settlement are met. The class representatives could "fairly and adequately protect the interests of the class," Rule 23(a)(4), because of the common interest of

all class members in obtaining the recovery rather than losing the insurance coverage, and in balancing of the interests of currently injured and future claimants. Moreover, this class action settlement also meets the requirement of Rule 23(b)(1)(B) for a non-opt-out class action.

For these reasons, elaborated below, the decision of the Court of Appeals should be affirmed.

A. The question common to all class members was avoidance of the risk of loss of Fibreboard's insurance.

This settlement was prompted by one common question affecting all class members—whether all class members would accept the terms of this settlement or lose the insurance proceeds that might otherwise have evaporated in an adverse coverage ruling between Fibreboard and its insurers.

By responding to this common question, this class action settlement does not manifest any intra-class conflict that might violate Rule 23(a)(4) and satisfies the requirements of Rule 23(b)(1)(B).

The salient facts supporting the foregoing conclusions were recited in the Court of Appeals' first opinion. *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996).

By 1988 Fibreboard's insurance coverage from insurers other than Pacific and Continental was largely exhausted, leaving Fibreboard unable to pay further judgments, settlements, or defense costs. *Id.* at 969.

By 1993, Fibreboard's insurance coverage from Pacific and Continental was very much in doubt. Continental refused to provide coverage, and that issue was being vigorously litigated in California and elsewhere. *Id.* at 969-970.

To preserve its continued viability, Fibreboard was forced to negotiate settlements in the form of contingent assignments to asbestos victims of Fibreboard's claims against Continental. Yet the validity of these settlements was at issue in the *Andrus* case in California and in Fibreboard's suit in the Eastern District of Texas. *Id.* at 969-970.

On the appeal of the California trial court's decision that all policies from inhalation to manifestation were triggered, both Fibreboard and its insurers stood a substantial risk of losing the appeal. *Id.* at 974. If the insurers lost the coverage case, then without a settlement they would face "staggering liability." *Id.* at 971. If the insurers won the coverage case, then without a settlement Fibreboard would require immediate bankruptcy protection from $1.2 billion of settlement obligations outstanding by the end of 1992, *id.* at 970-971, and the members of this settlement class would recover virtually nothing. Without a settlement, Fibreboard could also have lost Continental's coverage if the assignment settlements were ruled to be breaches of Fibreboard's agreements with Continental. *Id.* at 969, 974. These considerations, intensified by the pendency of oral argument on August 27, 1993, prompted the parties to negotiate for a global settlement.

In such a settlement, however, Continental required "total peace," *i.e.*, protection from any additional liability for claims against Fibreboard, including claims that would be brought in the future. Under California law Continental could not obtain "total peace" unless persons already harmed by Fibreboard's asbestos products were represented. *Shapiro v. Republic Ins.*, 52 Cal.2d 437, 341 P.2d 289 (1959). *Shapiro* held that in a suit between the insurer and the insured the judgment granting reformation and finding no coverage was not binding on a claimant against the insured, where the claimant "had suffered the injuries" but was not a party to the coverage action.

Under *Shapiro*, exposure-only victims could argue that they had a right to be represented in any settlement of Fibreboard's liability because, as the trial court had already held in Fibreboard's insurance coverage action, the term "injuries" (at least in an insurance policy) included the subclinical scarring of lung tissue that, upon inhalation of asbestos fibers, begins the disease process. *See Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1, 37-48, 52 Cal.Rptr. 690 (1996).

Therefore, to obtain "total peace" Continental was compelled to reach agreement with a class that represented all persons who might ever develop an injury from Fibreboard's asbestos. Thus, this class action, brought by representatives of all persons who had been exposed to Fibreboard's asbestos but had not yet sued, was essential to facilitate the settlement.

It would be ironic—and tragic—if this class action settlement were to be held invalid because the extent of

the class, as required by state law, were deemed to violate the requirements of Rule 23. Because the insurers could not obtain "total peace" unless future claims were included in the settlement, this global asbestos settlement necessarily included both currently injured claimants and future claimants in the same class. Hence, the joinder of these diverse interests in this single class was not a vice that violates Rule 23, but was an unavoidable requirement grounded in the 40-year latency of asbestos diseases[2], a medical fact that Rule 23 should accommodate.

In other contexts courts have applied traditional legal concepts to fit the unique medical facts of asbestos diseases in a manner that balances the needs of plaintiffs, the needs of defendants, and sound judicial administration.

For example, following a decision of this Court,[3] courts commence the personal injury statute of limitations in asbestos cases, not with inhalation of fibers or commencement of the disease or even medical detection of symptoms, but rather with the plaintiff's knowledge or reason to know of the asbestos disease. *E.g., Velasquez v. Fibreboard Paper Products Corp.*, 97 Cal.App.3d 881, 885, 159 Cal.Rptr. 113 (1979).

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[2] Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991).

[3] *Urie v. Thompson*, 337 U.S. 163 (1949) (the statute of limitations for silicosis commences upon manifestation, regardless of the earlier undetected commencement of the disease).

Another judicial recognition of the unique realities of asbestos injuries occurs with respect to causation. Normally a plaintiff must prove that the defendant caused the plaintiff's injury. However, because the plaintiff cannot prove that a particular defendant's asbestos fibers *"actually contribut[ed]* to . . . the plaintiff's or decedent's" disease, courts allow asbestos plaintiffs to prove only that the defendant's asbestos products made a substantial "contribution to the plaintiff or decedent's *risk* or *probability* of developing" asbestos disease. *E.g., Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 977, 67 Cal.Rptr. 16 (1997) (emphasis in original).

Again, because asbestos victims can develop more than one disease at different times, many courts have recognized that the usual rule against splitting a claim into two separate suits cannot be mechanically applied. Instead courts do not allow one asbestos disease to commence the statute of limitations (and thus bar recovery) for a subsequent, different, and often more lethal asbestos disease.[4]

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[4] *E.g., Marinari v. Asbestos Corp., Ltd.*, 612 A.2d 1021, 1022 (Pa.Super. 1992); *Potts v. Celotex Corp.*, 796 S.W.2d 678, 680-85 (Tenn. 1990); *Fusaro v. Porter-Hayden Co.*, 548 N.Y.S.2d 856, 860 (N.Y.Sup. 1989); *Mauro v. Raymark Industries, Inc.*, 561 A.2d 257 (N.J. 1989); *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 320 (5th Cir. 1986); *Devlin v. Johns-Manville Corp.*, 495 A.2d 495, 502 (N.J.Super.L. 1985); *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517, 522 (Fla.App. 1985); *Sheppard v. A.C. and S. Co.*, 498 A.2d 1126, 1129-1134 (Del. 1985); *Smith v. Bethlehem Steel Corp.*, 492 A.2d 1286 (Md. 1985); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 521 (5th Cir. 1984); *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (5th Cir. 1982).

Under the foregoing authorities—harmonizing existing rules of law with the medical realities of asbestos diseases—the consolidation here of currently injured and future claimants into one class must be regarded, not as an impediment to a class action settlement under Rule 23, but as a necessity, especially because both groups had a common and urgent interest in securing insurance proceeds through a class action settlement and because no showing can be made that the interests of one group have been materially sacrificed to the interests of the other.

In sum, to avoid the all-or-nothing consequences created by the insurance coverage litigation, the parties agreed to this class action settlement, creating a $1.535 billion trust necessarily for the benefit of the class of all asbestos victims who had not yet sued Fibreboard.

B. The settlement provides substantial benefits to all class members.

For many reasons, the settlement before the Court is far preferable for all class members to the disaster to the class lurking in the possibility of a loss on appeal of Fibreboard's insurance coverage. In particular, the trust's dispute-resolution mechanisms provide a structure that maximizes fairness to both currently injured and future asbestos victims while minimizing the compromise of their rights. For example:

- More of the settlement proceeds go to the claimants because transaction costs are reduced and attorneys' fees are limited to 25%.

- Claimants have a series of settlement opportunities—with the trust, in mediation, in arbitration, or with the District Judge or his designee—while preserving the right to trial by jury.
- Claimants can recover any amount that the claim merits, up to $500,000 per claim, while giving up only damages above this amount and punitive damages. No claim valid under state law is barred.
- The assets of the trust are protected for later claimants by spendthrift provisions that limit the amount of assets paid out in any given year, and if payments are limited during a particular year, the sickest claimants are paid first. *In re Asbestos Litigation, supra,* 90 F.3d at 973.

These provisions are as generous and as fair to all class members as possible under the circumstances.

C. This settlement does not suffer the infirmities of the *Amchem* settlement.

The settlement should be affirmed because it does not suffer the infirmities that this Court found, or that AVA objected to, in *Amchem.*

First, in *Amchem* the settlement failed to pass muster under Rule 23(b)(3) because the only common questions underlying the settlement were the claimants' asbestos exposure and interest in settling rather than bringing suit. *Id.* at 2249. In the instant case, however, class certification rests on the provisions of Rule 23(b)(1)(B), and a common

question "identical to interests held by all members of the class" does exist—whether all claimants could obtain access to insurance proceeds or risk receiving no compensation at all. 90 F.3d at 976.

Second, although the *Amchem* settlement's structure created a conflict between present and future claimants, preventing adequate representation by the named parties, Rule 23(a)(4), no such conflict has materialized in the instant case.

- Unlike *Amchem,* where the class members did not face an all-or-nothing threat to compensation, the members of this class were unified by their common interest in avoiding the total loss of Fibreboard's insurance.
- Unlike *Amchem,* which made no adjustment for inflation (harming future claimants to benefit present claimants), this settlement contains protections for future claimants that are fair and reasonable on their face but imposes no significant restriction on recovery by currently injured claimants.[5]
- Unlike the limited opt-out provisions in *Amchem,* here any claimant who believes his or her claims are not being fairly compensated may sue.

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[5] Minor restrictions, which apply equally to all class members, include (1) limiting recovery to $500,000 (not a very significant limitation inasmuch as only a dozen civil recoveries against Fibreboard have exceeded that amount); (2) no recovery of punitive damages; and (3) no allowance of pre- and post-judgment interest.

- Unlike *Amchem*, here class members were represented by a guardian ad litem.
- Unlike *Amchem*, here expert testimony established that the compromises accepted by the class did not sacrifice the interests of present claimants at the expense of future claimants or vice-versa.
- This Global Settlement Agreement was found to be fair and reasonable, a finding not challenged on appeal. *Id.* at 976-982.

For these reasons, the intra-class conflict that this Court found in *Amchem* is not manifest in the settlement before this Court and cannot be shown to have materially diminished the rights of currently-injured claimants at the expense of future claimants or vice-versa.

AVA urges affirmance for the additional reason that the vices that AVA objected to in the *Amchem* settlement are absent in the instant case.

- In *Amchem* certain cognizable state law claims received no compensation whatsoever. Here all claims cognizable under state law are compensable.
- In *Amchem* the defendants retained control of the funds, creating an incentive to undervalue claims. Here the trust will be administered by neutral trustees.
- In *Amchem* compensation values were significantly less than historical CCR settlement values. Here the trust or a jury will value each claim on its merits.

- In *Amchem* compensation values were fixed, without adjustment for inflation, thus harming future claimants. Here no fixed compensation amounts are set, and the trust or jury may take inflation into account.
- In *Amchem* the asbestos defendants determined whether the claim qualified for compensation and the claimants's right to sue was severely restricted. Here the independent trustees must consider all cognizable claims, and all claimants may sue.
- In *Amchem* defendants offered class counsel settlements of inventory claims greater than the class would receive under the settlement, and medical criteria were imposed on future claimants only. Here no such inconsistent treatment exists between the class and other clients of class counsel[6] or between currently injured and future claimants.

For these reasons AVA urges approval of the settlement as lacking the conflicts and other flaws that beset the *Amchem* settlement.

The alternative to approving this settlement—the Trilateral Settlement—is vastly inferior for asbestos victims for two reasons.

- Under the Trilateral Settlement Fibreboard will spend much of the limited settlement proceeds to litigate

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[6] District Court Findings of Fact, ¶¶ 329-331, CA 407a-408a.

claims in the tort system, thereby shifting hundreds of millions of dollars away from compensation and creating a risk of no compensation for future claimants.[7]

- Under the Trilateral Settlement asbestos victims will likely pay 33% to 40% of their recoveries in attorneys' fees rather than the 25% maximum set by the class settlement, and other costs will combine with attorneys' fees to consume up to 63% of all monies.[8]

These factors will cause asbestos victims to receive several hundred million dollars less under the Trilateral Settlement than under the Class settlement.[9]

In sum, AVA—like the representative plaintiffs, Class counsel, the guardian ad litem, the District Court and the Court of Appeals—has no hesitation in supporting this settlement because the compromises accepted by the Class were eminently reasonable in light of the compelling need to resolve Fibreboard's insurance disputes on terms favorable to all Class members and the settlement's relatively minor limitations on recovery.

In an ideal world it is conceivable that the Class might have received more than $1.535 billion through the tort system. But this is not an ideal world. At the time of the settlements, no one could know what the final resolution of the coverage case would be. If Fibreboard had lost

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[7] *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 529 (E.D. Tex. 1995).

[8] *Id.* at 530.

[9] *Ahearn, supra*, 162 F.R.D. at 529.

its insurance claims, it would have become bankrupt and Class members would have received *nothing* because Fibreboard's net worth was far outstripped by the $1.2 billion that Fibreboard already owed its present asbestos victims. Because of Fibreboard's relatively small size compared to its much greater asbestos-related tort liabilities, all Class members had a pressing interest in avoiding an adverse outcome of Fibreboard's insurance dispute.

AVA therefore urges this Court to focus on the real financial interests of the victims rather than on the theoretical issues argued by Petitioners. Such focus demonstrates that the benefits of this settlement to Class members vastly outweigh the limitations on individual recoveries accepted as the price of obtaining the settlement and sharing the settlement proceeds fairly and equitably over time among all Class members entitled to share in it.

AVA regards the resolution of Class members' claims by a victim-oriented trust—using a wide range of commonly-accepted ADR procedures before resort to litigation in the tort system thus reducing transaction costs and maximizing funds available to pay Class member claims—as a positive benefit of this settlement.

Another very substantial benefit is the limitation on attorneys' fees to a maximum of 25%, increasing Class members' net recovery by 10-25%.

Petitioners and their supporting *amici curiae* would jeopardize the rights of Fibreboard's asbestos victims because they fear that an affirmance by this Court might some day be read to disadvantage some possible future

victim of a future mass toxic tort. To avoid this most theoretical of potential risks, they ask the Court to ignore—and possibly destroy—the very rights and interests of the tens of thousands of real existing and future asbestos victims whose compensation from Fibreboard will be assured if the settlement is approved.

This Court should not embrace theoretical fears about the misapplication of law in other cases at the expense of justice in this case. AVA speaks for the real interests of asbestos victims in the affirmance of this settlement. This settlement created a trust amply funded with over $1.5 billion that indisputably constituted a fair settlement of the insurance dispute that could have had catastrophic consequences for all members of the class. If this settlement is not approved, compensation for all of Fibreboard's asbestos victims will be reduced by significantly increased attorney fees, litigation expenses, and costs of defense, increasing the likelihood that future claimants against Fibreboard will obtain no recovery.

CONCLUSION

For all the foregoing reasons, Rule 23, construed under Rule 1 to encourage the "just, speedy, and inexpensive determination of every action," poses no obstacle to the class settlement. The decision of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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September 9, 1998